

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

FEB 28 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2006-0362-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
EDWARD HERNANDEZ,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200300660

Honorable Stephen F. McCarville, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt

Tucson  
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Edward Hernandez was convicted of promoting prison contraband and sentenced to a prison term of 15.75 years, to be served consecutively to the prison term he was already serving. We affirmed his conviction and sentence on appeal. *State v. Hernandez*, No. 2 CA-CR 2005-0259 (memorandum decision filed Nov. 15, 2006). Hernandez also filed a petition for post-conviction relief pursuant to Rule 32,

Ariz. R. Crim. P., 17 A.R.S., in which he alleged his attorney had been ineffective in failing to adequately communicate a deadline for acceptance of a plea agreement that had been offered by the state. The trial court summarily denied relief, reasoning as follows:

In this case . . . the defendant admitted in his affidavit that he had rejected the plea. Accordingly, any deadline became moot. It was not until the day of trial that the defendant obviously had a change of heart and informed [his attorney] that he then wished to accept the plea. Once a plea has been rejected, there is no obligation on the state to make any further offers. The defendant has not alleged that he requested trial counsel to make any counter offers, or, that trial counsel failed to inform him of the offer that he rejected.

¶2 In his petition for review, Hernandez contends the trial court erred by dismissing his claim without holding an evidentiary hearing. We review a trial court's denial of post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶3 Under Rule 32.6(c), a petition may be summarily dismissed if the trial court finds no "material issue of fact or law [exists] which would entitle the defendant to relief." Thus, a defendant is entitled to an evidentiary hearing only "when he presents a colorable claim, that is a claim which, if defendant's allegations are true, might have changed the outcome." *Watton*, 164 Ariz. at 328, 793 P.2d at 85. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984);

*State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine whether the other prong was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶4 The trial court did not abuse its discretion in implicitly determining that Hernandez has failed to establish either deficient performance by counsel or prejudice. According to Hernandez, the state had offered him a plea agreement that would have limited his sentence to no more than five years' imprisonment, to be served consecutively to the term he was already serving. After Hernandez told his attorney he did not want to accept this offer, he received the following correspondence from counsel, dated June 8, 2004:

It is my understanding that you have rejected this plea offer. However, if you proceed to trial under the current circumstances, you face a significantly longer [prison] sentence . . . [of] 10.5 years to 35 years, with 15.75 years as the presumptive sentence.

. . . [I]t is my strong advice to you at this time to accept the plea offer.

If you want the plea offer, you will need to sign the plea offer that I have provided to you and return it to me as soon as possible. If you want the plea offer and wait too long, the County Attorney may withdraw the same and the plea offer may no longer be available to you.

At that time, Hernandez's trial date was scheduled for July 27, 2004.

¶5 Hernandez did not sign or return the plea agreement and has provided no evidence that he ever communicated with counsel about conducting any further plea

negotiations. His trial date was continued to April 5, 2005. On the first day of trial, he informed counsel that he wished to accept the plea offer he had previously rejected. According to Hernandez, “he was not adequately advised when the plea offer would expire,” and “because the trial date was continuously postponed[,] he did not understand that the plea offer had actually been withdrawn.”

¶6 In *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000), Division One of this court held that counsel’s failure to give a defendant accurate advice about the relative merits of a plea agreement could result in a constitutionally significant injury to a defendant who rejects the offer and proceeds to trial. But, assuming without deciding that *Donald* was correct on this point, counsel’s advice in this case was not inaccurate. Counsel correctly advised Hernandez about the merits of the plea agreement and the risks of trial and urged him to reconsider his rejection and accept the plea offer while it was still available. And counsel warned Hernandez that he must act “as soon as possible” because the offer could be withdrawn by the state. This, too, was a correct statement of the law. See *State v. McKinney*, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (noting “the ability of the prosecution to discontinue negotiations at will or withdraw a plea offer prior to court acceptance”); see also Ariz. R. Crim. P. 17.4(b), 16A A.R.S. (“An agreement may be revoked by any party prior to its acceptance by the court.”); *State ex rel. Thomas v. Rayes*, 213 Ariz. 326, ¶ 22, 141 P.3d 806, 815 (App. 2006) (“[A] defendant has no constitutional right to specific enforcement of a plea offer, particularly in the absence of any

misconduct by the prosecutor.”) (emphasis omitted), *review granted*, No. CV-06-0303-PR (Ariz. Jan. 9, 2007). Thus, Hernandez has failed to establish a colorable claim that counsel’s performance was deficient.

¶7 The trial court did not abuse its discretion in finding Hernandez has also failed to establish prejudice. Although Hernandez suggests he was prejudiced because he was not told of a specific expiration date and was therefore “not . . . given the opportunity to firmly accept or reject [the plea],” this argument strains credulity. Hernandez could not have reasonably relied on counsel’s warning to reconsider his rejection of the offer and act “as soon as possible” as an assurance that the state would continue to offer favorable terms on the morning of trial nine months later. *Cf. State v. Superior Court*, 160 Ariz. 71, 72, 770 P.2d 375, 376 (App. 1988) (state entitled to withdraw plea agreement before acceptance by court; suggesting defendant’s detrimental reliance on signed plea agreement could, in some cases, preclude state from revoking agreement).

¶8 Moreover, as the trial court correctly concluded, taking all of Hernandez’s allegations as true, his rejection of the plea offer made any deadline for its acceptance irrelevant. No offer was pending at the time of trial, and “[w]e do not believe the *Donald* rationale, assuming it is sound, can be extended beyond plea agreements actually offered by the state.” *State v. Jackson*, 209 Ariz. 13, ¶ 7, 97 P.3d 113, 116 (App. 2004) (no prejudice shown where defendant had rejected plea offer and could only speculate about what other offers might have been made).

¶9 We find no abuse of discretion in the trial court’s summary denial of post-conviction relief. Hernandez has failed to state a colorable claim for relief, and no purpose would be served by further proceedings. *See* Ariz. R. Crim. P. 32.6(c). Accordingly, although we grant review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge